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No. 85-708

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALL SOULS EPISCOPAL CHURCH, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AND DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner, a depositor of an insolvent bank, contends that it is entitled to retain funds mistakenly paid in excess of the insured deposit limit.

1. On Friday, July 2, 1982, Penn Square Bank, N.A. (Penn Square) issued three cashier's checks totaling $452,527.25 to petitioner All Souls Episcopal Church (All Souls). On Monday, July 5, 1982, Penn Square was declared insolvent, the FDIC was appointed receiver and, in turn, created the Deposit Insurance National Bank of Oklahoma City, Oklahoma (DINB) as its agent to distribute the insured portion of deposits in the failed bank.[1] Upon

[1]Under 12 U.S.C. 1821(h), the FDIC has the authority to create a new bank to facilitate the payment of insured deposits. See 12 U.S.C. 1821(i), (j), (k), and (*l*).

declaration of Penn Square's insolvency, All Souls' cashier's checks became deposits in the insolvent bank. 12 U.S.C. 1813(*l*)(4). Thus, as a depositor, All Souls was entitled to $100,000 in federal deposit insurance. 12 U.S.C. 1813(m)(1).

On July 6, 1982, the cashier's checks were presented to DINB for payment. DINB mistakenly paid out the face amount of the checks, $452,527.25, rather than the $100,000 to which All Souls was entitled. Shortly thereafter, respondents commenced this action for restitution of the $352,527.25 overpayment to petitioner.

2. The district court granted summary judgment in favor of petitioner. It held that while respondents had established a prima facie case for restitution of money mistakenly paid, recovery was barred because the overpayments were "final" within the provisions of the Uniform Commercial Code (12A Okla. Stat. Ann. § 3-418) (West 1963).

The court of appeals reversed. It ruled that petitioner's claim against the FDIC was based on a deposit obligation created by federal law, not on the U.C.C. (Pet. App. 5a). Since payment in excess of insured amounts was contrary to federal statutes governing the liquidation of failed national banks (*id.* at 6a), such payments were barred, and respondents were entitled to restitution of the balance.

3. The decision of the court of appeals is correct. It does not conflict with any decisions of this Court or of any other court of appeals. Further review is therefore not warranted.

a. Upon the insolvency of Penn Square, the cashier's checks became deposits, the payee became a depositor, and the rights and liabilities of the parties were fixed by federal statutes applicable to federal deposit insurance and the liquidation of the assets of a failed bank. 12 U.S.C. 1813(*l*)(4), 1813(m)(1); *American National Bank* v. *FDIC*, 710 F.2d 1528, 1540 (11th Cir. 1983). It is well established that

the rights and obligations of the FDIC are governed by federal law. *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447 (1942); *United States* v. *Yazell,* 382 U.S. 341, 354 (1966). Under the Federal Deposit Insurance Act, when the FDIC liquidates an insured institution such as Penn Square, a depositor generally is authorized to receive up to $100,000 from the deposit insurance fund. For this reason the DINB was empowered to pay only the *insured* deposits of the failed bank (see 12 U.S.C. 1813(m), 1821(h)); any payments in excess of that amount were unauthorized. See *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384 (1947). Accordingly, petitioner has no rightful claim "to retain money that it should never have received in the first place." *Heckler* v. *Community Health Services,* No. 83-56 (May 21, 1984), slip op. 9; *United States* v. *Wurts,* 303 U.S. 414, 415 (1938); see *Wisconsin Central R.R.* v. *United States,* 164 U.S. 190, 207-212 (1896); *United States* v. *Burchard,* 125 U.S. 176 (1888); *Woods* v. *United States,* 724 F.2d 1444, 1448 (9th Cir. 1984).

b. The issues of state law petitioner posits do not present any occasion for this Court's review. In any event, petitioner's arguments cannot displace the governing principle of federal law that, in these circumstances, payment of more than $100,000 was unauthorized. Finally, petitioner's state law contentions are incorrect. The special rules of the Uniform Commercial Code relating to negotiable instruments, holders in due course and transactions in the ordinary course of business with a solvent bank, do not supersede laws governing the distribution of Federal Deposit Insurance proceeds and the liquidation of the assets of a failed bank. *Harmsen* v. *Smith,* 693 F.2d 932 (9th Cir. 1982), cert. denied, 464 U.S. 822 (1983); *Miller* v. *Wells Fargo Bank International Corp.,* 406 F. Supp. 452, 470 (S.D.N.Y. 1975); *Lewis* v. *Franklin Savings Bank of New York,* 98 Misc. 2d 1098, 1100, 415 N.Y.S.2d 362, 364 (Civ. Ct. 1979); 12 U.S.C. 1822(c), 1822(d).

Moreover, under Oklahoma law money paid through mistake is recoverable in restitution. *Avery* v. *Abraham,* 114 Okla. 101, 243 P. 728 (1926); Restatement of Restitution §§ 1, 15-27, 46-54 (1937); Restatement (Second) of Restitution §§ 1, 5 (Tent. Draft No. 1, 1983); D. Dobbs, *Handbook of the Law of Remedies* §§ 4.1, 4.3, 11 (1973). Similarly, the Uniform Commercial Code preserves the right of restitution for monies paid by mistake. 12A Okla. Stat. Ann. § 1-103 (West 1963); *Central National Bank & Trust Co.* v. *Community Bank and Trust Co. of Enid,* 528 P.2d 710 (Okla. 1974). Accordingly, even if petitioner were correct in urging that the U.C.C. settlement procedures applied in these circumstances, the result would be no different.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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